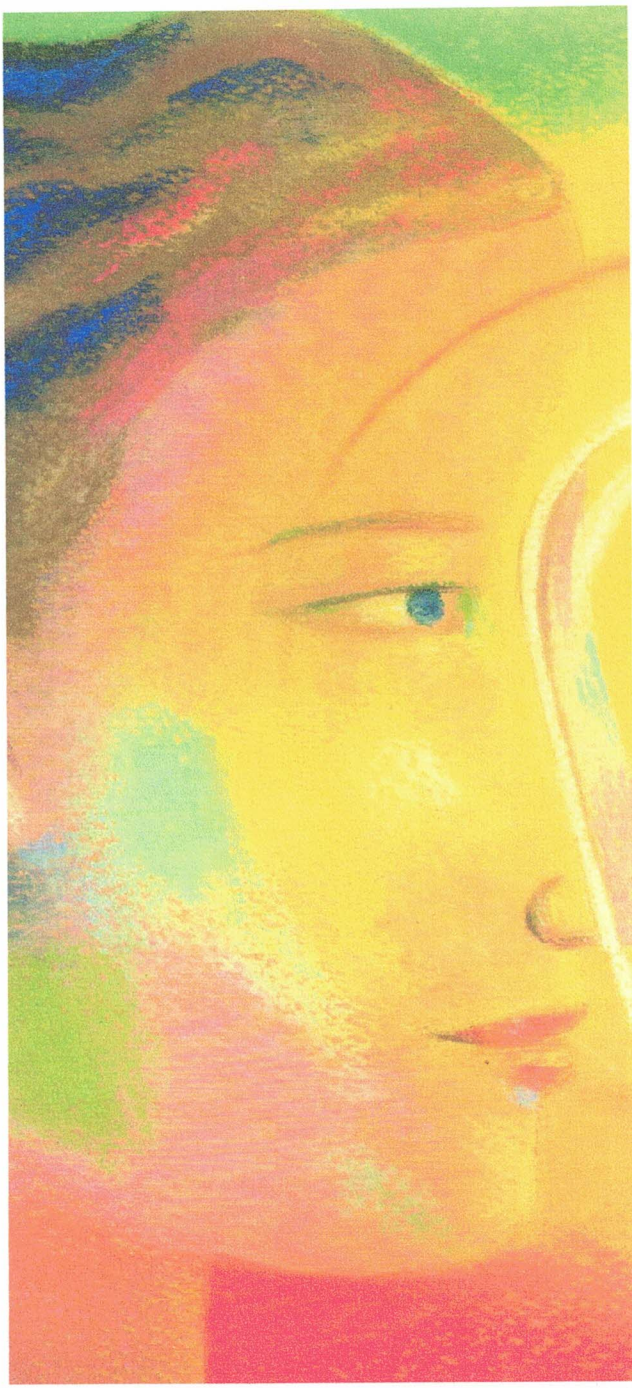
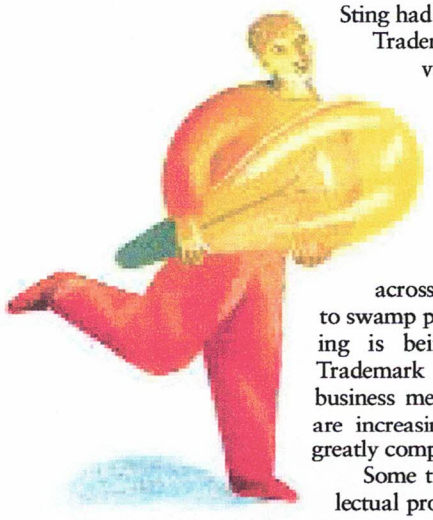
The tools of the trade

Richard Poynder describes changes in the system designed to manage and protect intellectual property assets



In the knowledge economy the primary source of wealth resides no longer in land, raw materials and factories, but in the ownership and management of information, knowledge and creativity. Furthermore, those who fail to manage and protect these intellectual property (IP) assets risk losing them – as the performer Madonna discovered when New Jersey businessman Dan Parisi bought the domain name www.madonna.com and began using it as a pornography clearing house.

Madonna eventually succeeded in claiming the domain name as hers alone. Musician and singer/songwriter Sting, however, was less fortunate. His attempts to obtain ownership of the previously registered www.sting.com were rejected, on the grounds that 'sting' was a common English word. Whereas Madonna had trademarked her name, Sting had not.



Trademarks, patents, copyright and their various derivatives are all tools of an international system designed to protect IP Rights (IPRs). But as individuals and companies scramble to acquire ever more control over these assets, the system is coming under increasing strain.

An inundation of patent applications across the industrialized world is threatening to swamp patent offices. At the same time, patenting is being extended: the US Patent and Trademark Office has authorized software and business method patents. Meanwhile, filing costs are increasing. And the internet, of course, has greatly complicated the picture.

Some things are already clear. Owning intellectual property is one thing. Obtaining the benefits of ownership is quite another. Consequently, active management is required. With the current system plainly in trouble, a search for alternatives is on.

IP is broadly defined as any outcome of creative processes, experimentation or even experience. And it can take many forms – the expression of ideas, inventions, books, poems, scientific articles, chemical formulae or computer software. Just like any other asset, IP can also be sold, licensed, bartered or given away for free.

But intellectual property is also different from tangible assets such as machines or buildings. Very often, it can be duplicated at low cost. It's precisely for this reason that IP is both so very attractive and so tricky to manage. The potential for duplication makes

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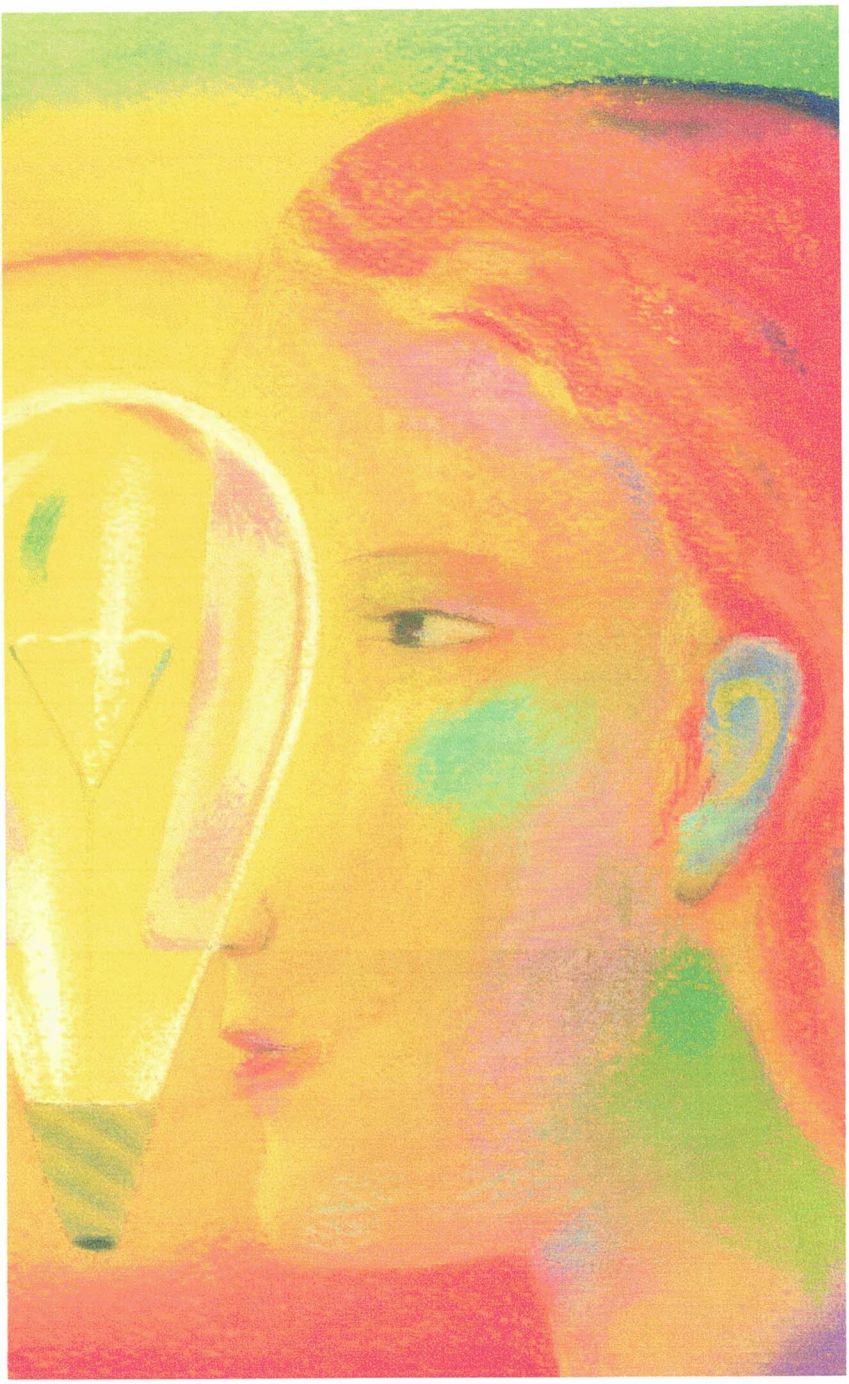


the value of IP highly volatile. As a result, virtually all societies grant IPRs to the creators of IP, in recognition of the fact that they would not be motivated to produce these increasingly essential assets if they did not have some way of protecting them.

Unlike more tangible assets, such as machines, IP can be duplicated at relatively low cost

The choice of IP protection tool depends, of course, on what is being protected – although many tools are also found in combination.

Patents protect inventions that are novel, useful, previously undisclosed and that exceed the current state of the art in some way. They are powerful defensive devices in competitive situations. But they expire 20 years after the date of application. Partly for this reason, they are often combined with trademarks – words or symbols that protect the brand name. This is especially common in certain industries – pharmaceuticals, for instance – where the strength of the trademark becomes absolutely essential once patent protection expires.

Patents can also be combined with copyright protection. Copyright protects authorship in literature, music, art, science and, importantly, software. These days, copyright protection is sometimes combined with patent protection for specific types of software. In contrast to patent protection, copyright expires in most industrialized countries 70 years after the death of the creator.

Soaring demand

Between 1995 and 1999, the overall global demand for patents rose from under 3 million to more than 7 million, an increase of 156%. Annual filings at the European Patent Office have more than doubled in the past 10 years. And similar rises can be seen for most other forms of IP. Trademark applications in the UK in 2000 were up 22%, at over 100,000.

Unsurprisingly, patent offices are struggling to cope – causing lengthening delays in the issuance of rights, and growing concern that a shortage of examination time means that many patents are awarded on dubious grounds.

Patent costs have also risen. Today it costs between $20,000 and $75,000 per patent application to file in key locations across the world. Many innovations simply do not justify these expenditures – hence the quest for alternatives.

One such is defensive publishing, a well-established practice that has grown in popularity in recent years as an alternative to patenting, rather than just an adjunct to it. Far cheaper than patenting, defensive publishing allows a company, rather than patenting all its inventions, to turn some of them into prior art by publishing them as invention disclosures. The logic behind this is that once an invention is in the public domain it cannot be patented. While this means giving up your right to patent it, it also allows you to block others from claiming ownership – and takes the pressure off patent offices.

Cost and convenience, however, are not the only drivers of change in the current system. The internet is arguably far more significant. It has certainly launched a whole new raft of opportunities for trademark abuse. Fraudsters will use well-known logos or brand names to sell counterfeit products and services over the web, either by using third-party product names to 'pass off' as the originals, or by inserting hidden tags

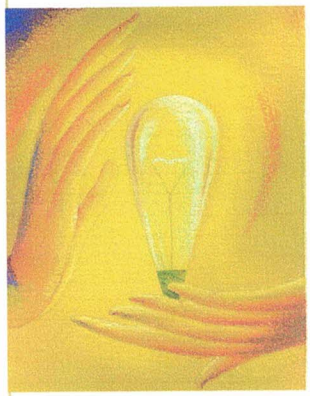
into web pages to fool search engines into routing customers to fraudsters' sites, rather than those of legitimate brand owners.

Many companies are now outsourcing the policing of this problem to specialist technology companies. The US-based Cyveillance, for example, claims to be able to scan the entire web for trademark and brand infringements.

Meanwhile, many trademarks have fallen victim to cybersquatters, who register well-known trademarks and brand names as domains, and then seek to sell them at inflated prices.

Domain names are effectively extensions of trademarks – insofar as they can be named after an existing company or brand. Where trademarks are limited by country or region, however, domain names are

WHAT'S IN A NAME?



One of the great embellishments of Indian cuisine is basmati, a long-grain rice greatly treasured for its distinctive fragrance, delicate taste and firm texture. It rightly commands a premium price. But who owns 'basmati'? What does it mean to own 'basmati'? And who should be entitled to make money from 'basmati' in the global marketplace?

Beneath these seemingly simple questions lie profound cultural and political differences over the control of knowledge, recognition of traditional cultures, access to technologies, and ownership of biological resources – differences at the heart of a passionate international debate.

The debate centers on the workings of an agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which was incorporated into the World Trade Organization (WTO) system in 1994.

The TRIPS agreement was a landmark event in the conceptualization of the so-called knowledge economy. It acknowledges that in an era when economic prosperity flows from knowledge-based resources, and access is more important than ownership, you can't expect to settle international trade disputes if you ignore the rising value of the intellectual property component of trade. Under TRIPS, the 144 WTO members agree to give a high level of protection to IPRs – for example, making 20-year patent rights available for almost any new technology.

The international TRIPS agenda now tends to focus on how to administer IPRs equitably. At the recent conference in Doha, WTO trade ministers clarified how the patent system can be used to promote access to pharmaceuticals and assist developing countries in their attempts to deal with public health crises.

TRIPS, nevertheless, has plenty of critics. Proponents of free trade fear it is a new kind of protectionism, obstructing trade just as traditional barriers are falling. What's next, they ask – environmental standards, labor rights, human rights?

For the anti-globalization movement, TRIPS epitomizes the growing clout of multinational corporations. TRIPS, they say, parcels up culture, knowledge and technology into a rigid set of private rights and places ownership and control firmly in the hands of the rich, industrialized world.

But TRIPS didn't spring from nowhere, nor does it simply capture the interests of rich countries. Developing countries took part in the negotiations on the Paris and Berne Conventions in the 1880s, which remain the legal core of TRIPs standards today.

Technology-poor countries have also employed IP laws to encourage the introduction of new technologies and to attract foreign investment. Japan and South Korea did not industrialize by spurning IPRs, but by strategic IP management. Before TRIPS, developing countries faced with bilateral IP disputes often had to buckle to trade pressures exerted by economic superpowers. TRIPS introduced a fairer form of dispute settlement – the rule of law.

TRIPS has also stimulated developing countries to assert their IP interests more vigorously – witness the case of basmati.

A 1996 US patent, 'Basmati Rice Lines and Grains', describing how new rice varieties were bred to thrive in US conditions yet rival the quality of the original basmati, were criticized as an audacious claim to monopolize the word 'basmati' and nullify the rights of traditional rice breeders. Patent rights can't affect the use of a word such as 'basmati', nor can they be legitimately claimed over existing plant varieties. But the case fueled deeper concerns about ownership of a cultural heritage.

In the end, the patent was reduced in scope. But a complex debate still rages over who is entitled to use the word 'basmati' – should it be reserved for traditional producers, or can their commercial rivals also use it? WTO negotiators still seek clear-cut, legal answers to these and similar questions.

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international and thus often subject to disputes. One might ask, for example, why Madonna should get www.madonna.com if someone else got there first? But after a few initial stumbles, the courts have taken the view that trademark owners do, in fact, carry rights to domain names.

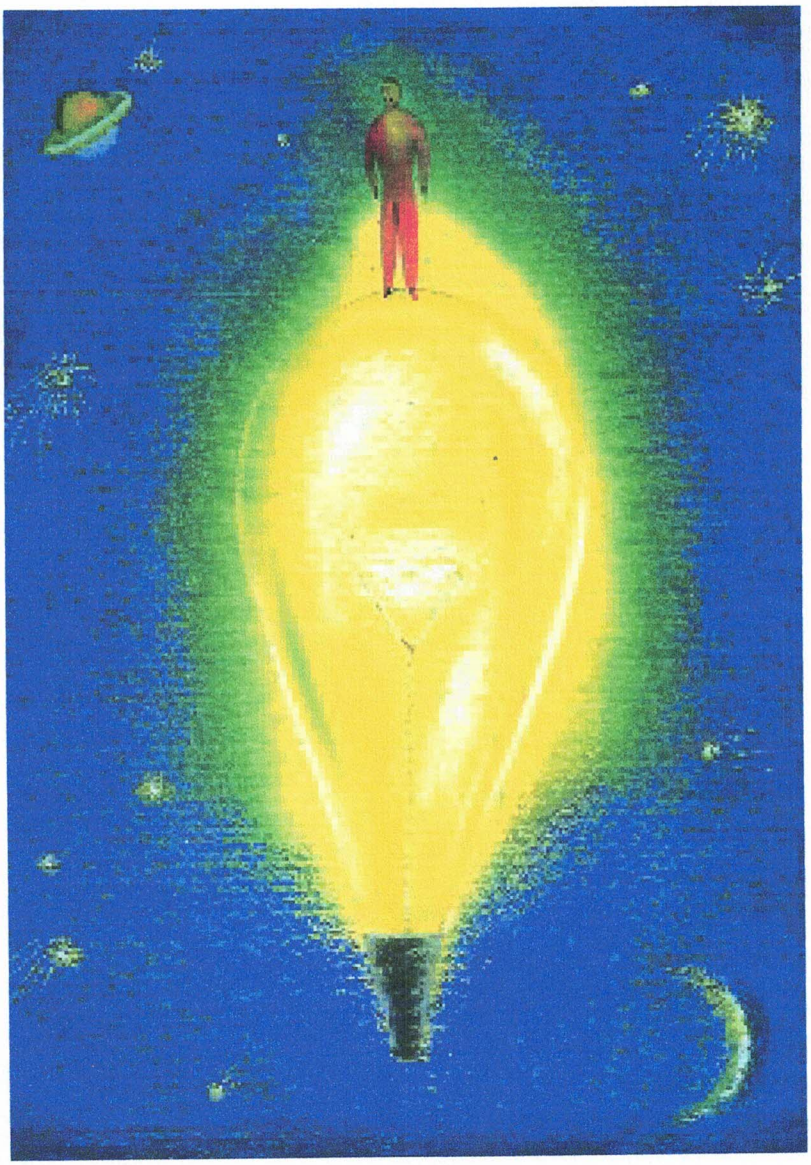
The World Intellectual Property Organization (WIPO) has also established an adjudication system and this, too, has a strong bias toward supporting trademark owners when deciding who gets a domain name (regardless of who actually registered it first).

Nonetheless, even though the new dispute procedure has gone some way toward helping, the recent release of new, top-level domain names – seven new generic top-level domains (gTLDs) have been approved, and the first two (.info and .biz) go live this year – has once again raised serious concerns regarding cybersquatting.

The internet presents new challenges for copyright, too – in particular, the need to create secure and effective means for selling content over the web. A number of new digital rights management, or DRM, technologies are now being developed, most of them made up of two components, as Charles Barlas, a senior consultant at the London-based consultancy Rightscom, explains. 'One is the technology to encrypt the content,' he says. 'The second contains the business rules determining how the content can be accessed, and by whom.'

These software controlled 'business rules' can be time-based rights, allowing the user to access the content only for 24 hours; access-based rights, where the user can perhaps view the content, but not copy or print it; and price-based rights, where the type of access available is determined by the price paid.

Since no DRM system is foolproof, however, it is also essential to police the network for infringement. Third-party suppliers such as UK-based Envisional claim to be able to detect copyright infringements anywhere on the web. But the size of the problem is formidable. 'In a recent survey,' says Brian Earle, CEO of Envisional, 'we discovered more than 10,000 copyrighted books currently available online for illegal downloading.'



The internet, indeed, is changing the balance of power in intellectual property. Criticisms of how big music companies use the web, for example, have led to calls for musicians to bypass record companies altogether and sell their music directly over the internet. After all, say proponents of such ideas, hasn't the primacy of intellectual capital shifted the balance of power definitively from institutions to individuals?

The courts have taken the view that trademark owners have rights to domain names as well

Perhaps. With a few significant exceptions – the inventor Thomas Edison had more than 1,000 patents – individuals simply haven't had that much intellectual property to protect. However, this may be changing now. A few years ago the musician and songwriter David Bowie floated a personal $55 million bond issue – secured against future royalties from his portfolio of albums. This would not have been possible if Bowie had not had the foresight to retain the creative rights to the albums, and then seek creative ways of exploiting them.

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